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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

DANIELLE COOK,

Plaintiff and Appellant,

v.

GALLADE CHEMICAL, INC., et al.,

Defendants and Respondents.

B213955

(Los Angeles County
Super. Ct. No. BC388113)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Aurelio Munoz, Judge. Affirmed in part and reversed in part.

Metzger Law Group, Raphael Metzger, Kimberly A. Miller, Sarah Hodgson for
Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Peter L. Garchie, Ruben Tarango for Defendant
and Respondent Gallade Chemical, Inc.

Connon Wood Scheidemantle, David R. Scheidemantle, Peter E. Schnaitman for
Defendant and Respondent Bostik, Inc., and Findley Adhesives, Inc.

Hurrell Cantrall, Thomas C. Hurrell, Melinda Cantrall for Defendants and
Respondents The Sherwin-Williams Company and PPG Industries, Inc.

Booth, Mitchel & Strange, Christopher C. Lewi for Defendant and Respondent
Citgo Petroleum Corp.

Drinker Biddle & Reath, Sandra L. Weiherer for Defendant and Respondent
Henkel Corporation.

Shook, Hardy & Bacon, R. Scott LaSalle for Defendant and Respondent
Mallinckrodt Baker, Inc.

Plaintiff Danielle Cook appeals the dismissal of her survival action in this toxic tort lawsuit brought, after Mr. Cook's death, against defendants Bostik, Inc., Findley Adhesives, Inc., Henkel Corporation, Exxon Mobil Corp., Shell Chemicals, Inc., Mallinckrodt Baker, Inc., Gallade Chemical, Inc., CITGI Petroleum Corporation, Tauber Petrochemical Company, PPG Industries, Inc., and The Sherwin-Williams Company. Plaintiff maintains that the doctrine of equitable tolling applies to the facts of this case, and thus the trial court's erred in ruling that the lawsuit was time barred. We agree in part, and so reverse the order of dismissal as to all defendants save PPG Industries, Inc. and The Sherwin-Williams Company.

FACTUAL AND PROCEDURAL BACKGROUND¹

Plaintiff filed the instant action on March 28, 2008, in her individual capacity, on behalf of her minor children, and as successor in interest to her deceased husband, Bryant Cook. The complaint alleged that Mr. Cook sustained serious, and ultimately fatal, injuries as a result of his exposure, over the course of his nearly 20-year tenure as a laborer at Steelcase, Inc., to toxic chemicals manufactured by certain defendants and supplied by other defendants to Steelcase, which used the products in the course of its business operations. The suit seeks so-called survival damages on behalf of Mr. Cook,

¹ The Sherwin-Williams Company and PPG Industries, Inc. requests this court to take judicial notice of federal court records regarding the Cook II lawsuit. We decline the request, as these records are unnecessary to our disposition of this appeal.

who died just weeks before this suit was filed, as well as wrongful death damages on behalf of Mrs. Cook and the couple's minor children.²

The complaint alleged that the Cooks learned that Mr. Cook's injuries might be occupationally related on or about September 10, 2005. Pursuant to Code of Civil Procedure section 340.8, the statute of limitations for these claims expired on or about September 10, 2007, some six months prior to the filing of the instant action. However, the complaint alleged that Mr. Cook had timely filed a complaint in federal court on or about February 28, 2006; that that matter was dismissed without prejudice on March 13, 2008; and that the statute of limitations was suspended during the pendency of the federal action, pursuant to the doctrine of equitable tolling. The first amended complaint in this action, filed on September 5, 2008, additionally alleged that the Cooks had filed, in November 2005, a lawsuit in Los Angeles Superior Court alleging essentially the same facts, seeking the same category of damages, and naming some of the same defendants which were subsequently named in the federal action and the current lawsuit (with the exception that the current lawsuit, filed after Mr. Cook's death, seeks wrongful death damages on behalf of Mrs. Cook and the couple's dependent children). The parties refer to the initial superior court action as "Cook I," the federal lawsuit as "Cook II," and the instant action as "Cook III." We follow this nomenclature for ease of reference.

Defendants Bostik, Inc. and Findley Adhesives, Inc., both of which had been named in the prior lawsuits, demurred to the amended complaint on multiple grounds, including the statute of limitations. The remaining defendants joined in this demurrer. In addition, PPG Industries, Inc., which was not a named defendant in either of the earlier actions, filed its own demurrer, again on multiple grounds, in which the remaining defendants also joined. Among the differences in the two demurrers were the arguments made on behalf of the defendants who had been named and served in the earlier lawsuits (the "Cook II Defendants"), and those who had not (PPG Industries, Inc. and The

² The trial court overruled defendants' demurrers to the wrongful death action. That ruling is not before us on this appeal.

Sherwin-Williams Company). The demurrers argued, among other things, that the doctrine of equitable tolling does not apply to the facts of this case.

The trial court sustained the demurrers "without leave to amend as to any claims for injuries suffered by decedent, Bryant Cook, during his life." The court made no mention of the equitable tolling doctrine upon which plaintiff relied to establish timely filing of the complaint, but stated: "In 2005, when the initial complaint was filed, plaintiffs knew the toxic chemicals had caused decedent's injuries. There is nothing in the complaint that can change this basic fact. By dismissing the original action and then proceeding into Federal Court and then coming back to this court plaintiffs allowed the two year statute of limitations to run. Nothing they ha[ve] stated or cited changes this basic fact." Thus, the trial court impliedly concluded that the facts alleged in the complaint failed to establish the requisite elements of the doctrine of equitable tolling.

DISCUSSION

1. *Standard of review*

The standard of review on appeal from a judgment dismissing an action after sustaining a demurrer is well settled: "The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. The judgment must be affirmed if any one of the several grounds of demurrer is well taken. However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [¶] As a court of review, we are not bound by the trial court's construction of the pleadings. Rather, the reviewing court must make its own independent judgment thereon, even as to matters not expressly ruled upon by the trial court. Where, as here, the demurrer is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. The burden of proving such a

reasonable possibility lies with the plaintiff." (*County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1009-1010, internal citations omitted.)

In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows the action may be barred. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) However, relevant matters properly the subject of judicial notice may be treated as having been pled. (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 842.)

2. *Equitable tolling*

Equitable tolling is a court-fashioned rule which applies in those situations in which the statute of limitations has run on a state court claim while the plaintiff has diligently pursued his or her remedies in an alternative forum. The doctrine is applied "to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court" (*Addison v. State of California* (1978) 21 Cal.3d 313, 316), and "can be applied to prevent a forfeiture in any situation in which the first action has failed to accomplish its purpose." (3 Witkin, Cal. Procedure (2008) Actions, § 740, pp. 965-966.)

Our Supreme Court held in *Addison v. State of California*, *supra*, 21 Cal.3d 313 (hereafter *Addison*) that the filing of a federal district court action suspended the running of the six-month statute of limitations within which to bring a suit against a public entity in state court. In *Addison*, after the defendants rejected the plaintiffs' timely filed damage claims, the plaintiffs filed a tort action against the defendants in federal court, alleging violations of both state and federal law. Nearly two and a half months after the defendants moved to dismiss the federal action for lack of jurisdiction, and after expiration of the six-month period to bring suit, the plaintiffs filed an action in state court in anticipation of an adverse ruling on the motion. The federal suit was dismissed the following week without prejudice to refile in state court after the district court concluded that a federal civil rights action would not lie against public entities. The trial

court sustained the defendants' demurrer to the state court action because the complaint was not timely filed. (*Addison, supra*, at pp. 315-316.)

In concluding that the limitations period did not bar the plaintiffs' claims, the court applied "the well established doctrine of 'equitable tolling'" to relieve the plaintiff of an otherwise untimely filing of the personal injury action. (*Addison, supra*, at p. 316.) The *Addison* court stated: "It is fundamental that the primary purpose of statutes of limitation is to prevent the assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available. . . . The statutes . . . serve a distinct public purpose, preventing the assertion of demands which through the unexcused lapse of time, have been rendered difficult or impossible to defend. However, courts have adhered to a general policy which favors relieving plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage. [Citations.]" (*Addison, supra*, 21 Cal.3d at pp. 317-318.)

Citing its prior decision in *Bollinger v. National Fire Ins. Co. of Hartford, Conn.* (1944) 25 Cal.2d 399, 410, the court added, "[T]his court is not powerless to formulate rules of procedure where justice demands it. Indeed, it has shown itself ready to adapt rules of procedure to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits." (*Addison, supra*, 21 Cal.3d at pp. 318-319.) Applying these principles to the plaintiffs' case, the court explained: "[A]pplication of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff. These elements seemingly are present here. As noted, the federal court, without prejudice, declined to assert jurisdiction over a timely filed state law cause of action and plaintiffs thereafter promptly asserted that cause in the proper state court. Unquestionably, the same set of facts may be the basis for claims under both federal and state law. We discern no reason of policy which would require plaintiffs to file simultaneously two separate actions based upon the same facts in both state and federal courts since 'duplicative proceedings are surely inefficient, awkward and laborious.' [Citations.] [¶]

Furthermore, since the federal court action was timely filed, defendants were notified of the action and had the opportunity to begin gathering their evidence and preparing their defense. No prejudice to defendants is shown, for plaintiffs' state court action was filed within one week of the dismissal of the federal suit. To apply the doctrine of equitable tolling in this case, in our view, satisfies the policy underlying the statute of limitations without ignoring the competing policy of avoiding technical and unjust forfeitures."

(*Addison*, *supra*, 21 Cal.3d at p. 319.)

From the decision in *Addison*, a definitive three-pronged test has been created for invocation of the doctrine of equitable tolling in situations where a plaintiff has more than one avenue of legal recourse available, which consists of the following elements:

"(1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to defendant in gathering evidence to defend against the second claim; and, (3) good faith and reasonable conduct by the plaintiff in filing the second claim." (*Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 924.) The court in *Collier* defined those elements: "The timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim." (*Ibid.*) The second element requires "that the facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put him in a position to fairly defend the second." (*Id.* at p. 925.) With respect to the third element, the *Collier* court found good faith and reasonable conduct "less clearly defined in the cases" but reasoned long delay "even after crediting the tolled period . . . might be considered unreasonable" or intentionally lulling "the defendant into believing the second claim would not be filed . . . might be deemed to constitute bad faith." (*Id.* at p. 926.)

The three elements of equitable tolling are present here with respect to the Cook II Defendants. The Cooks satisfied the first element by filing their claim in federal court within two years of learning that Mr. Cook's illnesses were work-related. In addition, the Cook II Defendants were the same ones as those in the instant case. Consequently, there

is no question the filing of the federal action alerted the Cook II Defendants of the need to begin investigating the facts which form the basis of the current lawsuit. The second element is satisfied because the state law claims asserted in Cook II are identical to the survival claims asserted in Cook III. Since the claims are identical, there is no prejudice to respondents, as notice of the claims in Cook II certainly afforded defendants an opportunity to obtain evidence that could be used to defend against the survival claims asserted in Cook III. As for the third element, Mrs. Cook filed Cook III only 10 days after the district court dismissed the federal action for lack of subject matter jurisdiction. This does not appear to us to be unreasonable conduct or a "long delay" in bringing the state action, particularly in the absence of any prejudice to defendants.

The Cook II Defendants cannot reasonably maintain that the first and second elements of the equitable tolling test have not been satisfied. It is the third element – good faith and reasonable conduct – which these defendants contend is missing in this case. Defendants argue that, under the factual circumstances of this case, plaintiff cannot establish that she prosecuted her claims in good faith. This contention is based, however, on disputed facts not appearing on the face of the complaint. It therefore will not support the trial court's order sustaining the demurrer, for both this court and the trial court must accept the facts pleaded in the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The Cook II Defendants also argue that *Wood v. Elling Corp.* (1977) 20 Cal.3d 353 and *Hull v. Central Pathology Service Medical Clinic* (1994) 28 Cal.App.4th 1328 establish that plaintiff may not avail herself of the benefits of equitable tolling. These cases are inapposite, as we explain.

In *Wood v. Elling, supra*, the plaintiff timely filed a complaint against multiple defendants in state court, which was served on some but not all of the defendants. Two of the defendants moved for dismissal of the lawsuit on the ground that service and return of summons had not been effected upon them within three years of commencement of the action; the action was ultimately dismissed as to these two defendants. The plaintiff then brought a second lawsuit in the same court seeking the same relief and again naming the previously dismissed defendants.

On the previously dismissed defendants' demurrer based on the running of the statute of limitations, plaintiff argued that the statute was tolled upon filing of the previous lawsuit until the date, over four years later, that the dismissal order was entered. The Supreme Court rejected the argument: "'In the absence of a statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice to him.'" (*Wood v. Elling, supra*, 20 Cal.3d at p. 359.) The court also ruled that the second complaint did not qualify for equitable tolling, since the plaintiff could not establish that he satisfied the third prong of the test for such tolling, that is, that he diligently pursued the prior action. (*Id.* at pp. 361-362; see also, *Thomas v. Gilliland* (2002) 95 Cal.App.4th 427, 430 [plaintiff's first suit filed within three months of discovery of claim and voluntarily dismissed 22 months later; second action filed same day first suit dismissed; plaintiff did not get back the remaining nine months of the original one-year limitations period.]) This circumstance is not present in the case before us, for plaintiff's amended complaint alleges facts which establish her diligence in pursuing Cook II, as well as her good faith reasons for filing Cook III.

In *Hull v. Central Pathology Service Medical Clinic, supra*, 28 Cal.App.4th 1328 the plaintiff brought a medical malpractice action in state court. Two months before the scheduled trial date, she filed a motion for leave to amend her complaint to add two causes of action for intentional torts and a punitive damage claim. The trial court ultimately denied the motion, pursuant to Code of Civil Procedure section 425.13, subdivision (a), which applies to claims asserting punitive damages against health care providers. The plaintiff then filed a second state court action, alleging the causes of action and punitive damage claim she had sought to assert in the first action by her motion for leave to amend, as well as a new claim for breach of contract. The trial court granted the defendants' demurrer to the second action on the ground the statute of limitations barred the action. (*Hull v. Central Pathology Service Medical Clinic, supra*, at pp. 1331-1333.)

The plaintiff in *Hull* contended on appeal that the doctrine of equitable tolling precluded dismissal of the second action based on the statute of limitations. We rejected this argument, as the plaintiff had not satisfied the prerequisites to application of equitable tolling: that is, she had not diligently pursued the claims asserted in the second action, since she knew the facts underlying those claims at the time the complaint was originally filed, yet failed to assert them in the first action by, for example, amending the complaint to include these additional causes of action, but without a prayer for punitive damages.

In contrast to *Hull*, Mrs. Cook did not file a second action in which she alleged claims that could have been brought in the initial lawsuit, but were not. To the contrary, Mrs. Cook has been pursuing the same toxic tort claim in each of Cook I, Cook II, and Cook III.

The Cook II Defendants also rely on *Sierra Club, Inc. v. California Coastal Com.* (1979) 95 Cal.App.3d 495, 503-504 and *Garabedian v. Skochko* (1991) 232 Cal.App.3d 836, 848, to argue that equitable tolling is not available to plaintiff because the identical defendants were not named in the prior and subsequent lawsuits. However, the cases cited rejected the doctrine not simply because additional defendants were named in the second action, but because the plaintiff failed to meet the requirements of the doctrine when the defendants named in the second action had not been named and served in the prior action. Thus, while this argument is persuasive as to those defendants who were named and served for the first time in 2008, it provides no assistance to the Cook II Defendants, which have been on notice of the claims against them, and in fact were in the process of litigating those claims, at the time of the filing of the complaint at issue in this lawsuit.

Finally, from the fact that plaintiff has filed her lawsuit in multiple forums, the Cook II Defendants accuse plaintiff of forum shopping. These defendants argue that such bad faith conduct prevents the application of equitable tolling: "Equitable tolling is a fact intensive issue and it is determined based upon evidence. Accordingly, we [a reviewing court] are compelled to affirm the trial court's rejection of the theory if there is substantial

evidence to support its determination." (*Thomas v. Gilliland, supra*, 95 Cal.App.4th at p. 434.)

The *Thomas* court correctly characterized as fact-intensive the issue of whether or not a litigant has prosecuted her case in good faith. However, the court misspoke when it suggested that the substantial evidence test has any application to a reviewing court's assessment of the propriety of sustaining a demurrer. In any event, there is nothing in the allegations of this complaint, or in any matter judicially noticed by the trial court, which "evidences an intent to delay disposition of the case without good cause . . ." or suggests that plaintiff "engage[d] in the procedural tactic of moving the case from one forum to another in the hopes of obtaining more favorable rulings." (*Mitchell v. Frank R. Howard Memorial Hospital* (1992) 6 Cal.App.4th 1396, 1407-1408.)

3. *Timeliness of complaint even if the statute of limitations were equitably tolled*

The Cook II Defendants also argue that, because Mr. Cook was diagnosed with kidney disease in 1993, "the statute of limitations on [plaintiff's] claims in the First Amended Complaint would have expired, at the latest in 1994, over 11 years before the Cook I action was filed and over 13 years before this Cook III action was filed." This is so, defendants argue, because plaintiff "pleads no specific facts to overcome the general presumption that, when Cook was diagnosed with liver [sic] disease in 1993, he was placed on notice of a wrongful injury and the one-year statute of limitations on his claims began to run." The Cook II Defendants conclude that the dismissal of plaintiff's survival action was proper because Mr. Cook's personal injury claims in Cook III were untimely.

Unless modified by the "discovery rule," an action for personal injury accrues on the date of injury. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109.) "The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause. [Citation.] A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her." (*Id.* at p. 1109, fn. omitted.)

Plaintiff alleges that when Mr. Cook was diagnosed with kidney disease and brain cancer, both plaintiff and Mr. Cook "were ignorant of the toxic nature of said injuries and diseases and of their occupational cause," and that "no physician informed decedent or plaintiffs of the cause of decedent's kidney disease or his brain cancer or that decedent's kidney disease and brain cancer even had a cause." The Cook II Defendants fail to explain why Mr. Cook's diagnosis of kidney disease should have put him "on notice of a wrongful injury" such that he was obliged to discover that he had suffered a compensable injury. Indeed, this argument simply assumes that if, upon learning that he had kidney disease, Mr. Cook had investigated a potential link between his disease and his exposure to defendants' chemicals, he would have discovered that defendants were responsible for his medical condition. There is no evidence in the record to support such an assumption, nor is a demurrer the proper vehicle for testing what Mr. Cook knew or should have known in 1993.³

4. Relation back doctrine

PPG Industries, Inc. ("PPG") was not named as a defendant until March 28, 2008, when Cook III was filed. Thus, PPG was first put on notice of plaintiff's claims after the statute of limitations had expired in September of 2007. Consequently, the allegations of the amended complaint concerning equitable tolling do not apply to this defendant. Plaintiff nevertheless maintains that the survival claims against PPG are timely due to the relationship back doctrine. We do not agree.

Plaintiff's argument relies upon the statutory framework for fictitiously-named defendants. As plaintiff argues, Code of Civil Procedure section 474 provides that "[w]hen a plaintiff is ignorant of the name of a defendant, he must state that fact in the

³ The Cook II Defendants also conclude that if the cause of action based on Mr. Cook's kidney disease is time barred, he may not sue these defendants for his later brain cancer. This conclusion is suspect. (See, e.g., *Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1146.) However, because it is not essential to our resolution of this appeal, we do not address the issue.

complaint . . . and when his true name is discovered, the pleading or proceeding must be amended accordingly." "The purpose of the fictitious name statute is to enable plaintiff to commence suit in time to avoid the bar of the statute of limitations where he is ignorant of the identity of the defendant. The statute should be liberally construed to accomplish that purpose." (*Barnes v. Wilson* (1974) 40 Cal.App.3d 199, 203.)

As plaintiff explains, "In order for the relation-back doctrine to apply, the following must be true: (1) the original complaint must have stated a valid cause of action against the now-identified, doe defendant; (2) the plaintiff must have been 'genuinely ignorant' of the defendant's identity at the time of filing the original complaint; and (3) the amended complaint must be based on the same set of general facts and same injuries as the original complaint. *Firemans' Fund Ins. Co. v. Sparks Const., Inc.* (2004) 114 Cal.App.4th 1135, 1143." Plaintiff acknowledges that her present state court action "technically is not an 'amended' complaint from her original federal complaint." That is to say, she acknowledges that the relation back doctrine does not apply to this case. She nevertheless asks this court to apply the doctrine because "the underlying purpose of the relation back doctrine is served by treating it as such." This we cannot do.

In adopting Code of Civil Procedure section 474, the Legislature set the parameters for adding newly-discovered defendants to a lawsuit after the statute of limitations on the claim against those defendants has expired. The facts before us do not fit those parameters. While our Supreme Court has recognized that courts are "not powerless to formulate rules of procedure where justice demands it" (*Addison, supra*, 21 Cal.3d at pp. 318-319), we are not persuaded that justice makes that demand in this case. Simply put, plaintiff cannot benefit from the relation back doctrine because she did not file an amended complaint which she seeks to relate back to the original complaint. Rather, the survival claims against PPG are stale, and this defendant is entitled to the repose afforded by application of the statute of limitations.

5. *The Sherwin-Williams Company*

Unlike all of the other defendants in this case, The Sherwin-Williams Company ("Sherwin-Williams") was not originally named in Cook III. It had, however, been named in Cook I and Cook II, but was never served with either of those complaints. On November 12, 2008, plaintiff substituted Sherwin-Williams in place of Doe I; Sherwin-Williams was served with the Doe amendment on December 2, 2008. Thus, Sherwin-Williams first had notice of the Cooks' claims on December 2, 2008, well after the statute of limitations on those claims had expired.

Plaintiff argues that "equitable tolling applies to Sherwin-Williams because Sherwin-Williams was on constructive notice when it was named in the Cook I and Cook II complaints, which were filed and matters of public record. See, *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 924 (stating that the filing (but making no mention of service) of the first claim must alert the defendant to begin investigating facts which form the basis for the second claim)." The contention is without merit. Patently, plaintiff cannot satisfy one of the three requirements of equitable tolling – that she diligently pursued her claim against Sherwin-Williams – when she did not even serve this defendant with the complaints in Cook I and Cook II.

DISPOSITION

The judgment is reversed as to all defendants except PPG and Sherwin-Williams, as to whom the judgment is affirmed. All defendants save PPG and Sherwin-Williams are to bear plaintiff's costs on appeal. Plaintiff is to bear the costs on appeal of PPG and Sherwin-Williams.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.